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No. _____
Court of Appeals No. 56265-7-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SATOMI, LLC,

Petitioner,

v.

SATOMI OWNERS ASSOCIATION,

Respondent.

AMICUS CURIAE BRIEF ON BEHALF OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF AUTHORITIES

Federal Cases

Washington cases

Other cases

Statute(s)

Miscellaneous

I. INTRODUCTION

This case presents a critical question involving construction contracts in Washington state: whether arbitration clauses in condominium contracts are enforceable. The parties here disagree as to whether the Federal Arbitration Act (FAA) pre-empts the anti-arbitration provision in the Washington Condominium Act.

When the Satomi Owners Association sued developer Satomi alleging construction defects, Satomi sought to enforce the arbitration clause included in the warranty addendum of the original sales contract. The Owners Association argued that Washington Condominium Act's judicial enforcement provision applies to this case, therefore, Satomi could not compel arbitration. The Court of Appeals agreed with the Owners Association, despite the fact that most of the building materials came from out of state and the United States Supreme Court has ruled that the FAA pre-empts state laws similar to Washington's. The Court of Appeals decision leaves an indefinite number of contracts in Washington state open to litigation because their arbitration clauses are now called into question.

II. ISSUE OF CONCERN TO *AMICUS CURIAE*

Does the Federal Arbitration Act pre-empt the Washington State Condominium Act's judicial enforcement provision in this case, where the conflict arises from alleged construction defects and most of the construction materials came from other states?

III. IDENTITY AND INTEREST OF *AMICUS CURIAE* BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington (BIAW) is the largest trade association in the state with over 12,600 members, employing over 350,000 Washingtonians. Most of our members enter into construction contracts – including arbitration clauses – with their customers and clients. Therefore, BIAW's members are directly impacted by any decision or policy change that affects the validity of terms included in those contracts.

BIAW, as an association representing numerous home builders who will be affected by this Court's decision, brings a unique perspective of those who are directly impacted by the lower court's decision. Therefore, BIAW believes an *amicus curiae* brief can be of substantial assistance to this Court.

IV. STATEMENT OF THE CASE

Amicus BIAW adopts and incorporates the statement of facts as set forth in Petitioner's brief for the Court of Appeals.

V. ARGUMENT

Amicus BIAW asks the Court to accept review of the case, and to ultimately reject the opinion of the court of appeals and rule that the Federal Arbitration Act (FAA) applies here. This case satisfies grounds in RAP 13.4(b) for granting review of a Court of Appeals decision by the Supreme Court. The Court of Appeals' majority ruling in this case presents a significant issue under the Constitution of the United States.

A. The Court of Appeals decision ignores (1) Congressional intent and (2) the United States Supreme Court's record on the FAA.

1. Congress intended a broad reach for the FAA.

The Court of Appeals ignored Congressional intent and clear precedent when it incorrectly decided the FAA does not apply to this case. The FAA states simply:

> A written provision in any maritime transaction or a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

> grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2

The enactment of the FAA was a clear rejection of historic judicial hostility toward arbitration. *See* Jon O. Shimabukuro, *The Federal Arbitration Act: Background and Recent Developments,* CRS Report for Congress, updated August 15, 2003; Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: a Look at the Past, Present and Future of Section 2*, 29 U. Rich. L. Rev. 1499 (1995). The United States Supreme Court has repeatedly held that the purpose of the Federal Arbitration Act is to "overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995) (citing *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).)

In 1984, the United States Supreme Court addressed the specific issue of whether state courts were subject to the FAA, holding that the FAA created "federal substantive law requiring the parties to honor arbitration agreements that must be enforced by both state and federal courts under the Supremacy Clause of the United States Constitution." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

Further emphasizing Congressional commitment to the fundamental purpose of the FAA, the Court in *Allied-Bruce* pointed out

that Congress has enacted federal laws "extending, not retracting," the scope of arbitration, both before and after the decision in *Southland. Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265. With nearly a century passed since the enactment of the FAA, both Congress and the Supreme Court have made clear that the purpose of the FAA is to prevent courts from invalidating arbitration agreements, as the Court of Appeals did in this case.

2. The Court of Appeals incorrectly limited the FAA's reach.

The Supremacy Clause of the United States Constitution establishes that federal statutes are the "supreme Law of the land":

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const., Art. VI, cl. 2.

In addition, the United States Supreme Court has said that the phrase "involving interstate commerce" implies the broadest possible reading of the scope of Congress' power under the commerce clause. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995).

The FAA applies to this case because the construction of the condominiums involved interstate commerce and the Supremacy Clause demands that the FAA supersedes the Washington Condominium Act's anti-arbitration provision.

The dissent in the Court of Appeals decision correctly concludes that the FAA applies to the facts of this case. "Interstate commerce is clearly implicated by a project on which not one brick or refrigerator but 70 percent of the building components are manufactured, ordered, and shipped from other states." *Satomi, LLC v. Satomi Owners Association*, 159 P.3d 460, 470 (Wash.App. Div. 1,2007) (Agid, J., dissenting).

The Respondent in this case relies on a Washington case from 1995, where the Court of Appeals considered another condominium project and determined that the FAA was not implicated where the sales contract involved only Washington residents. *Marina Cove Condominium Owners Ass'n v. Isabela Estates*, 109 Wash.App. 230 (2001). There are two important responses to this argument. First, this case arises from defective materials in construction, and over 70 percent of the materials used in this case involved interstate commerce. In *Marina Cove*, ". . .[t]he only connection to other states involves one buyer, who moved to Washington from another state, and another buyer, who transferred funds from an out-of-state bank account for use as a down payment on one unit

purchased." *Marina Cove*, 109 Wash. App. at 244. Second, since the *Marina Cove* decision, the United States Supreme Court issued a decision in *Citizens Bank vs. Alafabco, Inc.*, applying the FAA to a debt restructuring agreement between an Alabama contractor and an Alabama bank. The *Citizens Bank* court re-iterated the broad reach of the FAA. *Citizens Bank*, 539 U.S. 52 (2003). The Appeals Court in this case acknowledged that in light of *Citizens Bank*, "*Marina Cove*'s continuing validity is questionable." *Satomi*, 159 P.3d at 466.

The Court of Appeals incorrectly concluded that the FAA's commerce requirement requires more than out-of-state construction materials. In fact, this court and the United States Supreme Court have determined that the FAA should be construed broadly, and courts in other states have ruled that out-of-state construction materials amounts to interstate commerce. (*See e.g. Basura v. U.S. Home Corp.*, 98 Cal. App.4th 1205, review denied, 2002 Cal. LEXIS 6245 (2002); *Shepard v. Edward Mackay Enterprises*, 148 Cal. App.4th 1092 (3rd Dist 2007) and *Warbington Const., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853 (Tenn.Ct.App.,2001).

For example, two appeals in California have considered facts similar to this case. In *Basura*, homeowners sued a developer for construction defects and the appeals court ruled that the FAA applied and

the arbitration clause was enforceable because building materials and equipment from out of state were involved in the construction. *Basura*, 98 Cal. App.4th at 1214. The "materials" included "equipment such as GE Appliances, Merrilet Cabinets, Majestic Fireplaces, Alanco Windows, Carrier Heat & Air equipment, Progress Lighting, Delta plumbing, World Carpet, and Armstrong flooring, which were manufactured and/or produced in states outside California, including Nevada, Arizona, Connecticut, Indiana, South Carolina, Pennsylvania, Michigan, Tennessee and Georgia, and which were shipped to the jobsite . . ." *Basura*, 98 Cal. App.4th at 1214.

In another California case involving a home damaged by a plumbing system that was negligently installed, the appeals court concluded that the FAA pre-empted a state law permitting a purchaser of real property to bring a construction defect case even where an arbitration clause was included in the contract. The court concluded that " . . .the number of building materials shown by defendants to have come from interstate commerce indicates this case is not one involving a merely 'trivial' impact on interstate commerce, which would be outside the limits of Congress' power." *Shepard*, 148 Cal.App.4th at 1101. In *Shepard*, the commerce included flooring from out of state, doors made in Mexico, and

trusses, windows and appliances from out of state. *Shepard*, 148 Cal.App.4th at 1100.

B. The Court of Appeals decision ignores this court's long record and the record of the United States Supreme Court favoring arbitration of disputes as a matter of public policy.

This court has repeatedly ruled in favor of a strong public policy favoring arbitration. *See Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash.2d 293 (2004); *Int'l Ass'n. of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 51, 42 P.3d 1265 (2002); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 454, 45 P.3d 594 (2002); *Perez v. Mid-Century Ins. Co.*, 85 Wash.App. 760, 765, 934 P.2d 731

There are economic and efficiency reasons for the widespread use of arbitration clauses in construction contracts. Both parties benefit from the predictability gained and risk minimized by including such a provision. These are the reasons for Congress' and the Supreme Court's reinforcement of the FAA's broad reach. The United States Supreme Court referred to the discussion in Congress about arbitration's advantages, more than 50 years after the passage of the FAA:

> "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . ."

Allied-Bruce, 513 U.S. at 280 (quoting H.R.Rep. No. 97-542 p.13 (1982)).

Other advantages to arbitration are cost efficiency, confidentiality, and the nature the informal process itself, which encourages the parties to reach a solution. *See* Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: a Look at the Past, Present and Future of Section 2*, 29 U. Rich. L. Rev. 1499 (1995).

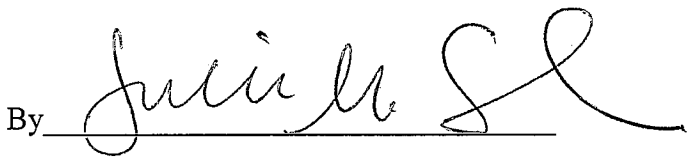
The United States Supreme Court also has a long record favoring arbitration. The Court has made clear that disputes over arbitration agreements "must be addressed with a healthy regard for the federal policy favoring arbitration . . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983).

According to the Court of Appeals majority opinion in this case, "a significant right created by state law is at issue." *Satomi*, 159 P.3d at 468. This statement might be conclusive if it existed in a vacuum, but it does not. A significant right created by *federal law* is *also* at issue, as well as the Supremacy Clause of the United States Constitution.

VI. CONCLUSION

Based on the foregoing, *amicus* BIAW requests this Court accept review of the Court of Appeals' decision in this case and rule in favor of Satomi, LLC.

RESPECTFULLY SUBMITTED this 7th day of September, 2007.

By 

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